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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 223

PEBBLE SPRINGS DISTILLING CO.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

CLAUDE A. ROTH,
SIDNEY U. HIKEN,
BENJAMIN M. BRODSKY,
BERNARD WEISBERG,
231 South La Salle Street,
Chicago 4, Illinois,
Counsel for Petitioner

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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It is unfortunate that we have to burden this Court with a reply to respondent's brief in opposition to our petition for a writ of certiorari. However, we strongly feel that a number of statements, suggestions and innuendoes in respondent's brief must be challenged in order to keep the issue in proper focus.

1. Respondent's "Question Presented" (R. Br., 2), is so worded (no doubt inadvertently) as to befog the legal question really involved, *i. e.*, whether a sale wholly for cash is or is not a tax free reorganization.

2. There is discussed in the last two complete sentences on page six of respondent's brief (a) what the respondent calls "the essence of the transactions," and (b) what in

respondent's opinion occurred—not according to the evidence—but "in effect." However, said statements constitute unwarranted and erroneous conclusions and inferences which ignore both what was actually done and the following *undisputed* facts: (a) that the receipt by the Silberstein, Venezky and Weiner families of their Old Peoria stock was wholly unrelated to, distinct and separate from and completely independent of, their receipt of liquidating distributions from the petitioner, and their ownership of any of petitioner's stock; (b) that neither they nor any other of petitioner's shareholders were bound to form Old Peoria, which was a different and separate enterprise and entity from the petitioner, nor was the formation of Old Peoria dependent on any plan of reorganization, nor related in any manner to any plan of reorganization (*United States* v. *Arcade Company* (C. A. 6th, 1953), 203 F. (2d) 230, Pet., App. C, 42-52); (c) that petitioner's liquidation would have been completed regardless of whether Old Peoria, some other individual or entity, or no one at all purchased its noninventory assets; (d) that petitioner was in fact out of the distillery business even before the auction was held since the petitioner at the date of the auction had already distributed, or irrevocably committed itself to distribute, as liquidating dividends, most of the bulk whiskey it owned (R. 45, 66); (e) that Old Peoria bought petitioner's noninventory assets for $242,080 in cash (R. 28-29); (f) that both the Tax Court and the court below so found and so stated in their opinions, not once but many times (Pet., App. B, 23-32, 36, 38); and (g) that the petitioner did not transfer any of its assets to Old Peoria in exchange for the latter's stock, nor did the Silbersteins, the Venezkys and the Weiners exchange any of their stock in the petitioner for Old Peoria stock. There was no exchange of any kind in this case by anyone.

Respondent has never yet attempted, before the Tax

Court, the Court of Appeals, and now this Court, to argue or even discuss the question as to whether the phrases "a sale of property" and "an exchange of assets or stock for stock" are, or are not, synonymous as a matter of law within the meaning of Section 112 (b)(3) or (4) of the 1939 Code. It is significant, we feel, that he has studiously avoided that question and instead has resorted at every step of this case to an "in effect" argument which unfortunately is "perilously plausible" if not viewed in its true colors. See, in this connection, the case of *Sun Properties, Inc.* v. *United States* (C. A. 5th, 1955), 220 F. (2d) 171, 173. However, the question as to whether sales and exchanges are legally identical under Sections 112 (b)(3) and (4) is not, and cannot be, answered by the "in effect" approach. The Tax Court opinion did not answer this question. The opinion below did not answer it. The respondent's brief in opposition pretends it does not even exist. Yet it is an important question of Federal law, with far-reaching consequences, not heretofore decided by this Court. We sincerely believe it should be decided.

3. At page seven of respondent's brief it is suggested that the cases of *Cortland Specialty Co.* v. *Commissioner* (C. A. 2d, 1932), 60 F. (2d) 937, certiorari denied, 288 U. S. 599, and *Pinellas Ice & Cold Storage Co.* v. *Commissioner* (1933), 287 U. S. 462, are distinguishable from the instant case because those cases "did not involve sales to controlled corporations." This, we respectfully submit, is a specious argument because both this Court and the Court of Appeals (2d) stated, as an absolute rule, that *a sale for cash is not a reorganization* without regard, one way or the other, to whether the buyer and seller are related to each other. Moreover, there are numerous other cases that have allowed the deduction of a loss sustained on a sale of property by one corporation to another even though the same individuals owned the stock of both. *Gen-*

eral Securities Company v. *Commissioner* (1938), 38 B. T. A. 330; *Shelden Land Company* v. *Commissioner* (1940), 42 B. T. A. 498; *Dauth* v. *Commissioner* (1940), 42 B. T. A. 1181; *Anderson, Clayton & Co.* v. *Commissioner*, T. C. Memorandum Opinion entered August 18, 1948, unofficially reported at paragraph 48,162, 1948 Prentice-Hall Memorandum Decisions; *Brost Motors, Inc.* v. *Commissioner*, T. C. Memorandum Opinion entered October 29, 1948, unofficially reported at paragraph 48,226, 1948 Prentice-Hall Memorandum Decisions. It is interesting to observe (a) that the Commissioner did not even raise the nontaxable reorganization issue in any of these cases and (b) that although the Commissioner lost each of them, he did not appeal any of them. The explanation must be that the Commissioner felt they were correctly decided. Respondent is aware of these cases, as were the Tax Court and the Court of Appeals. They were cited in petitioner's briefs before both of those courts. The Tax Court and the Court of Appeals ignored said decisions. The Commissioner now ignores them too, apparently in an attempt to gloss over the fact that the instant case poses an important issue so confused as to require action by this Court to dispel the confusion.

4. The article, Lyons, *Realignment of Stockholders' Interests in Reorganizations*, 9 Tax L. Rev. 237, 239 (1954), is cited at page eight of respondent's brief as though it has some bearing on the instant case. However, the only reference at page 239 of said article to Section 112 (g) (1) (D) is the quotation thereof, without embellishment and without comment. The subject of the article as a whole is spin-offs, split-offs and split-ups. No part of the article has anything whatever to do with the question of whether gain or loss is recognized on a sale of property solely for cash, or whether such a sale, albeit that and nothing more, nevertheless constitutes a reorganization involving an exchange of assets or stock for stock on which no gain or loss is recognized.

The petitioner respectfully submits, for the reasons set forth in its petition, as supplemented by its letter addendum thereto filed with the Court on July 27, 1956, and this reply, that its petition for a writ of certiorari should be granted,

Respectfully submitted,

CLAUDE A. ROTH,
SIDNEY U. HIKEN,
BENJAMIN M. BRODSKY,
BERNARD WEISBERG,
Counsel for Petitioner.

Dated: August 10, 1956.